

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-1649

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1649

EXXON CORPORATION, successor by merger to
ESSO INTERNATIONAL, INC.,

Plaintiff-Appellee,

—against—

A. L. BURBANK & COMPANY, LTD.,

Defendant-Appellant,

—and—

UNITED STATES OF AMERICA,

Defendant-Appellee.

JOINT APPENDIX

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United States Attorney

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PAGINATION AS IN ORIGINAL COPY

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Relevant Docket Entries

| DATE | PROCEEDINGS |
|------------|---|
| Apr. 10-67 | Filed complaint and issued summons |
| Apr. 25-67 | Filed summons & return, served A.L. Burbank & Co., Ltd. by Mr. Nolan 4-12-67; served U.S.A. by (Innamorato) & by regt. mail to Atty Gen'l 4-12-67 |
| June 7-67 | Filed ANSWER of U.S.A. |
| Sep. 3-68 | Filed Defts. ANSWER |
| Oct. 22-68 | Filed USA Reply |
| Jul. 17-69 | Filed deft. USA requests for admissions. |
| Jul. 25-69 | Filed pltff's NOTE OF ISSUE and statement of readiness |
| Aug. 15-69 | Filed deft. A.L. Burbank response to request for admissions. |
| Sep. 12-69 | Filed pltff's response to request for admissions. |
| Jan. 22-70 | Filed pltff's request for admissions |
| Feb. 9-70 | Filed deft's A.L. Burbank response to request for admissions. |
| Oct. 15-70 | Filed pltff's pre trial memorandum |
| Oct. 15-70 | Filed deft AL Burbank & Co. pre trial memorandum |
| Oct. 15-70 | Filed deft USA pre trial memorandum |
| Oct. 15-70 | Filed consent pre trial order—Motley, J |

Relevant Docket Entries

| DATE | PROCEEDINGS |
|------------|--|
| Apr. 13-71 | Filed pltff & deft USA affdvt, statement & notice of motion for summary judgment against deft A.L. Burbank & to dismiss complaint against USA ret. 5-4-71 |
| Apr. 13-71 | Filed pltff & USA memorandum of law in support of motion for summary judgment |
| July 1-71 | Filed Affdvt of Alfred A. Meyer, atty for deft A.L. Burbank & Co Ltd., in opposition to the joint motion of pltff and deft U.S.A. for an order granting summary judgment. |
| July 1-71 | Filed Memorandum of law in opposition to motion for summary judgment by Deft A.L. Burbank & Co LTD. |
| Sept. 1-71 | Filed MEMORANDUM by Cooper J.—The motion of pltff Esso Int'l Inc. for summary judgment against deft A. L. Burbank & Co. Ltd., and motion of deft U.S.A. to dismiss the cross-claim of deft Burbank are denied. Pltff's motion to dismiss the complaint as to deft U.S.A. is likewise denied. So Ordered—Cooper J. (mailed notices) |
| Jul. 2-73 | Filed Notice of Change of Name of pltf. Esso Int'l. Inc., to Exxon Corp. |
| Jul. 13-71 | Filed Reply Afft. of G.S. Fleischer dated July 9, 1971 in behalf of USA (filed in Court) |
| Sep. 10-73 | Non-Jury Trial begun and concluded Decision Reserved. |

Relevant Docket Entries

| DATE | PROCEEDINGS |
|------------|---|
| Sep. 19-73 | Filed Supplemental Memorandum of Deft. U.S.A. |
| Feb. 22-74 | Filed Consent Pre-trial order—Carter, J. |
| Feb. 22-74 | Filed trial brief of defendant |
| Feb. 22-74 | Filed supplemental memorandum of deft. A.L. Burbank & Co., Ltd. |
| Feb. 22-74 | Filed plaintiff's trial memorandum |
| Feb. 22-74 | Filed reply memorandum of deft. A.L. Burbank & Co., Ltd. |
| Feb. 22-74 | Filed trial memorandum of deft. A.L. Burbank & Co., Ltd. |
| Feb. 22-74 | Filed OPINION #40386 . . . for all the reasons indicated, the defendant A.L. Burbank, as agent for the owner Tankers & Tramps, must be liable for payment to the plaintiff of the bunker fuel oil, plus 6%, from the date of the filing of this lawsuit. So ordered.—Carter, J. m/n |
| Feb. 22-74 | Filed pltff's proposed Finding of Facts |
| Mar. 14-74 | Filed FINAL JUDGMENT, that this action is #74,266 hereby dismissed as against defendant United States of America and that the cross claim of deft. A.L. Burbank & Co., Ltd. against defendant, U.S.A. is dismissed with costs to be taxed. Ordered that the plaintiff, Exxon Corp. recover of the de- |

Relevant Docket Entries

| DATE | PROCEEDINGS |
|-------------|--|
| | <p>fendant A.L. Burbank & Co., Ltd. the sum of \$22,006.00 with interest thereon from April 10, 1967, in the amount of \$9,105.00 making a total recovery of \$31,111.00 with costs to be taxed, and that the plaintiff have execution therefor.—Carter, J. Judgment entered—Clerk</p> |
| May 1-74 | Filed deft. A.L. Burbank's notice of appeal to the USCA for the 2nd Circuit from final judgment entered on 3-14-74—copies mailed to US Atty. and Kirlin Campbell & Keating, Esqs. |

**Excerpts from Agency Agreement
Dated July 1, 1964**

AGENCY AGREEMENT

THIS AGREEMENT, made and entered into as of this 1st day of July, 1964 by and between TANKERS AND TRAMPS CORP. (hereinafter called "Owner"), a corporation organized under the laws of the State of Delaware, party of the first part and A. L. BURBANK & COMPANY, LTD. (hereinafter called "Agent"), a corporation organized under the laws of the State of New York, party of the second part.

WHEREAS, Owner owns a seagoing vessel, the S/T "ATLAS" (hereinafter called "Vessel"), under the United States flag; and

WHEREAS, Agent maintains offices and has sub-agents in principal ports of the United States and Canada; and

WHEREAS, Owner desires to arrange for the operation of Vessel and related activities by Agent as managing agent.

WITNESSETH:

GENERAL AUTHORITY

1. Owner appoints Agents as its exclusive agent to manage, operate, and conduct the business of the Vessel.
2. Agent agrees to manage, operate, and conduct as Agent only, the business of the Vessel in accordance with

Excerpts from Agency Agreement Dated July 1, 1964

the usual practice in the trade, as herein provided. Nothing in this Agreement should be considered as giving Agent control or possession of the Vessel or as having any interest whatever in the business, profits or liabilities resulting from the operation of the Vessel.

3. Agent shall perform all of the customary duties of managing agent. Without limitation of the foregoing, Agent shall, except as stated below, in the name of and on behalf of Owner:

• • • • •

b. Cause to be furnished to the Vessel . . . fuel, . . . required for the operation of the Vessel . . .

• • • • •

h. Collect all revenue and receivables due Owner and immediately deposit the funds in a bank account for the account of the Owner and identified as the A. L. Burbank & Company, Ltd. Special Account—Tankers & Tramps Corp. account (“Bank Account”). The Bank Account, from which withdrawals may be made by Agent only, shall be maintained in the Chemical Bank New York Trust Company or such other depository as may be approved by the Owner and the Secretary. No withdrawals shall be made from The Bank Account except to pay operating expenses of the Vessel, principal and interest due under the Mortgage, and mortgage insurance premiums, unless approved or directed by the Secretary.

• • • • •

Excerpts from Agency Agreement Dated July 1, 1964

IN WITNESS WHEREOF, the parties have caused this instrument to be executed by their duly authorized officers on the day and year first written above.

TANKERS & TRAMPS CORP.

By: /s/ **JAMES KATSOURIS**

A. L. BURBANK & COMPANY, LTD.

By: /s/ **PETER BURBANK**

APPROVED

UNITED STATES OF AMERICA
SECRETARY OF COMMERCE

BY MARITIME ADMINISTRATOR

By: /s/ **JOHN C. O'CONNELL**
Assistant Secretary
Maritime Administration

**Excerpts from Tanker Consecutive Voyage Charter Party
between Tankers & Tramps Corp. and United States
of America**

DEPARTMENT OF THE NAVY
MILITARY SEA TRANSPORTATION SERVICE
WASHINGTON, D. C. 20390

CONTRACT NO.
MST-TV-686(X)

[Stamp—

F. V. HANNUM & Co., INC.
25 BROADWAY
NEW YORK 4, NEW YORK]

TANKER CONSECUTIVE VOYAGE CHARTER PARTY

CONTRACTOR AND ADDRESS: TANKERS & TRAMPS CORP.
A.L. BURBANK & Co., LTD.,
AS AGENTS
120 WALL STREET
NEW YORK 5, NEW YORK

CONTRACT FOR: OCEAN TRANSPORTATION OF DEPARTMENT
OF DEFENSE PETROLEUM PRODUCTS

• • • • •

THIS CHARTER PARTY, (hereinafter sometimes
called the "Contract" and sometimes called the "Charter")
entered into this 4th day of November 1963, at Washington,
D. C., by and between THE UNITED STATES OF AMERICA (here-
inafter sometimes called the "Charterer" and sometimes
called the "Government") represented by the Contracting Of-

Excerpts from Tanker Consecutive Voyage Charter

ficer executing this document, and TANKERS & TRAMPS CORP., A.L. BURBANK & Co., LTD., AS AGENTS, a corporation organized and existing under the laws of the State of NEW YORK (hereinafter sometimes called the "Owner" and sometimes called the "Contractor").

WITNESSETH THAT

The Owner agrees to let and the Charterer agrees to hire the United States Flag SS ATLAS (hereinafter called the "Vessel") on the following terms and conditions:

* * * * *

7. Escalation Clause.

(a) The Owner warrants that the freight rate does not include any contingency allowance to cover the possibility of increased cost of performance resulting from increases in . . . or (5) the cost of bunker fuel. The Owner agrees that any increased costs of performance during the first year of the Charter shall be for its account and the Charterer and Owner agree that increases or decreases in costs of performance after the first year shall be subject to escalation as set forth in (c) through (e) below. The Owner shall submit Revised Schedules A and B showing costs in effect at the expiration of the first year in order to form a base in the event costs subsequent to that time require adjustment pursuant to this clause.

* * * * *

(e) In the event that after the first year of performance of this charter the Owner shall be required to pay bunker prices in excess of or less than those set forth in the Owner's

Excerpts from Tanker Consecutive Voyage Charter

bunker contract in effect at the termination of the first year of the charter, then in such event payment will be made by the Charterer or credits by the Owner, respectively. Adjustments of additional payments by the Charterer or credits by the Owner shall be made on the basis of the Owner's bunker contract but not to exceed prices set forth in "Contract Price List for Marine Fuel Oils" issued by Esso International Inc.

• • • • •

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

TANKERS & TRAMPS CORP.

By /s/ JAMES KATSOURIS
Vice President

A. L. BURBANK & Co., LTD., *As Agents*

By /s/ JOSEPH R. LINK

THE UNITED STATES OF AMERICA

By /s/

Contracting Officer
Military Sea Transportation Service
Department of the Navy

• • • • •

**Excerpts from Contract No. MA-3927 with Form of
Promissory Note Attached and Letter of U. S. Mari-
time Administration to Irving Trust Company, Dated
July 26, 1965 Attached**

**U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON, D.C. 20235**

IN REPLY REFER TO:

**Contract No. MA-3927
July 26, 1965**

**Tankers & Tramps Corp.
17 State Street
New York, New York**

Gentlemen:

Subject: SS ATLAS—Title XI Insured Mortgage

We have your letter dated June 28, 1965, requesting an advance of \$276,000 by the United States of America, represented by the Secretary of Commerce, acting by and through the Maritime Administrator ("Maritime") to be used to redeem an equal principal amount of United States Government-Insured Merchant Marine Bonds, 5% SS ATLAS ("Bonds") of Tankers & Tramps Corp. due on the Sinking Fund date of July 1, 1965, under the terms of the Bonds and Section 3.03 of the First Preferred Mortgage dated August 27, 1958, as supplemented to the date hereof ("First Preferred Mortgage"), on the SS ATLAS, securing the Bonds, held by Irving Trust Company, a New York corporation ("Trustee"), as Trustee under a Trust Inden-

Excerpts from Contract No. MA-3927

ture dated September 26, 1960 from Tankers & Tramps Corp. to the Trustee.

Maritime will advance the sum of \$276,000 to be so used subject to the following terms and conditions:

1. Tankers & Tramps Corp. ("Tankers & Tramps"), at the time of the Maritime advance, will execute and deliver to Maritime a promissory note ("Note") in the principal sum of \$276,000 in substantially the form attached hereto.
2. Tankers & Tramps, at the request of Maritime, will execute and deliver to Maritime, and promptly record, a supplement to the Preferred Ship Mortgage dated July 29, 1964, made by Tankers & Tramps to Maritime, on the SS ATLAS as further security for the Note, said supplement to contain such provisions and be in such form as Maritime shall specify. Tankers & Tramps, at the request of Maritime, will also execute and deliver to Maritime such endorsement of the Note as Maritime shall specify or in lieu thereof will execute and deliver to Maritime a promissory note or bond in substitution for the Note ("Alternate Note"); the Alternate Note to contain such provisions and be in such form as Maritime shall specify.
3. In consideration of the Maritime advance, Tankers & Tramps agrees:

• • • • •

- (f) so long as this agreement shall remain in effect, it will, if requested by Maritime apply any and all monies it receives from any source whatso-

Excerpts from Contract No. MA-3927

ever [except (i) amounts assigned to secure indebtedness to others with the approval of Maritime as required to discharge said indebtedness; (ii) amounts received by Tankers & Tramps for operating expense pursuant to Agreement, Contract No. MA-3928, or any other agreement approved by Maritime; and (iii) the \$325,000 advanced by Irving Trust Company to Tankers & Tramps on the date hereof.] and/or withdraw funds from the Restricted Fund referred to in the First Preferred Mortgage to pay or prepay the Note or Alternate Note and any amount payable under paragraph 3(a) hereof;

• • • •

Sincerely yours,

UNITED STATES OF AMERICA
Secretary of Commerce
By: Maritime Administrator
By: /s/ JAMES S. DAWSON, JR.
Secretary
Maritime Administration

Accepted: July 26, 1965

TANKERS & TRAMPS CORP.
By: /s/ RAYMOND J. SCULLY
President

ATTEST:
(SEAL)
/s/ JOHN HATGIS
Secretary

Form of Promissory Note

NOTE

\$276,000

New York, New York
July , 1965

Tankers & Tramps Corp., a Delaware Corporation (hereinafter referred to as the "Company"), for value received, hereby promises to pay to the order of the United States of America, represented by the Secretary of Commerce, acting by and through the Maritime Administrator (hereinafter referred to as the "Payee"), at the office of the Maritime Administration, Washington, D. C., on August 26, 1978, the principal sum of Two Hundred Seventy-Six Thousand Dollars (\$276,000) in lawful money of the United States, and to pay interest on the unpaid balance of the said principal sum from the date hereof until paid, in like money, at said office at the rate of 6 per centum (6%) per annum, said interest to be payable semi-annually commencing January 1, 1966.

This promissory note evidences an advance in the amount of \$276,000 made by the Payee to the Company and used by the Company to redeem an equal principal amount of United States Government-Insured Merchant Marine Bonds, 5% SS ATLAS (hereinafter referred to as the "Bonds") of the Company due on the Sinking Fund Date of July 1, 1965 under the terms of the Bonds and under § 3.03 of the First Preferred Mortgage dated August 27, 1958, as supplemented to the date hereof (hereinafter as so supplemented and as may hereafter be supplemented referred to as the "First Preferred Mortgage") on the SS ATLAS, securing the

Form of Promissory Note

Bonds, held by Irving Trust Company, a New York Corporation, Trustee under a Trust Indenture dated September 26, 1960, from the Company to said Trustee. By virtue of said advance and as security for this promissory note, the Payee is subrogated to the extent of this promissory note to all the rights of the holders of the Bonds and the Trustee under the First Preferred Mortgage and the lien created thereby and under any other collateral and security now or hereafter existing for the Bonds, subject, however, to the prior payment in full therefrom of the principal and interest and prepayment premium, if any, of the Bonds and of the claims of said holders and Trustee in respect thereof.

In case a Default, as defined in the First Preferred Mortgage, shall occur or upon the payment in full of the Bonds, the principal sum of this promissory note and all accrued interest thereon may be declared to be and shall upon such declaration become forthwith due and payable; *provided, however,* that the Payee may waive any such Default by written notice to the Company.

This promissory note may be prepaid in whole or in part at any time provided all interest payments are current and interest shall have been paid on the amount so prepaid.

TANKERS & TRAMPS CORP.

By:

President

USCOMM-MA-DC

Letter of U. S. Maritime Administration

Jul 26 1965

**Tankers & Tramps Corp.
115 Broad Street
New York 15, New York**

Gentlemen:

In reply to your request of June 28, 1965, the Maritime Administrator hereby consents to your borrowing from Irving Trust Company (Irving) prior to August 1, 1965, the amount of \$325,000 to be evidenced by a demand promissory note (Note) of Tankers & Tramps Corp. (the Company) in such amount and bearing interest at the rate of 6 per cent per annum. It is understood that the proceeds of the loan shall be delivered by Irving to the account of A. L. Burbank & Company, Ltd., Special Account, Tankers & Tramps Corp., and shall be used to pay: (1) the interest due July 1, 1965, on the First Preferred Mortgage on the SS ATLAS, (2) the interest due July 1, 1965, on the Second Preferred Ship Mortgage in the amount of \$8,977.50, (3) the mortgage insurance premium due Maritime for the period August 27, 1965, to August 26, 1966, plus any adjustment due for the current year's premium, and (4) current operating expenses of the Company.

It is further understood that this loan is to be secured by the following:

I. An assignment by the Company to Irving of the Company's rights under the Tanker Consecutive Voyage Charter Party (Contract No. MST-TV-606X) dated November 4, 1963 (the MSTS Charter), between the United States of

Letter of U. S. Maritime Administration

America, Department of Navy, Military Sea Transportation Service (MSTS) and the Company, providing for the charter by the Company of the SS ATLAS (the Vessel) to MSTS;

II. An assignment by the Company to Irving of the claims (the Insurance Claims) of the Company against underwriters to the SS ATLAS in the aggregate amount of \$75,000 representing damage incurred October, 1962, April, 1963, and August, 1963. The Insurance Claims (Claim No. 290) are presently in the hands of Oceanic Adjusters, Ltd., 80 Broad Street, New York, New York, and

III. Loan of hire insurance in the amount of the outstanding balance of the principal of the Note (not to exceed \$325,000) (the Additional Insurance) on the Vessel under insurance policies satisfactory to Irving issued by United States or British insurance companies, underwriters' associations or underwriting funds approved by Irving. It is understood that the amount of the Additional Insurance will be reduced consistent with each payment on the Note. The Additional Insurance is not deemed to be insurance pursuant to the First Preferred Mortgage and shall not be subject to the provisions of Section 2.15 of said Mortgage.

Maritime further consents to: (1) the assignment of the MSTS Charter to Irving, which is now held by Irving and remains in effect, as security for the loan by Irving and as security for an advance in the amount of \$276,000 to be made by Maritime, subject to prior payment in full of the Irving loan, and to be used by the Company to pay the principal installment on the First Preferred Mortgage on the SS ATLAS due July 1, 1965, and (2) the assignment to Irving,

Letter of U. S. Maritime Administration

which is now held by Irving and remains in effect, of the above-mentioned Insurance Claims, subject to the Mortgagee's (Irving Trust Company) consent. The assignment of the Insurance Claims shall terminate when the Note has been paid in full, however, the assignment of the MSTS Charter shall remain in effect until (a) the Note and (b) the advance by Maritime and all amounts due in connection with the advance, have been paid in full.

It is understood that the Irving loan is not secured by any lien on the Vessel and that Irving waives all rights of subrogation that may arise as a result of said loan or any part thereof being applied to payment of principal and/or interest on the said First Preferred Mortgage and/or the Second Preferred Mortgage dated July 29, 1964, from the Company to the United States of America.

Sincerely yours,

UNITED STATES OF AMERICA
Secretary of Commerce
By: Maritime Administrator

By: /s/ JAMES S. DAWSON, JR.
Secretary,
Maritime Administration

cc:

Irving Trust Company
Irving Trust Company, as Trustee
A. L. Burbank & Company, Ltd.

Excerpts from Contract No. MA-3928

Contract No. MA-3928

AGREEMENT

This agreement made and dated the 26th day of July 1965 (herein as the same may hereafter be amended or supplemented as hereinafter provided called the "Agreement") by Irving Trust Company ("Irving"), Tankers & Tramps Corp. ("the Company"), and the United States of America, represented by the Secretary of Commerce, acting by and through the Maritime Administrator ("Maritime").

WHEREAS:

1. The Company has requested an advance of \$276,000 by Maritime, being made this date, to be used to redeem an equal principal amount of United States Government Insured Merchant Marine Bonds, 5% SS ATLAS (the "Bonds") due on the sinking fund date of July 1, 1965, under the terms of the Bonds and the First Preferred Mortgage dated August 27, 1958 as supplemented to the date hereof, on the SS ATLAS securing the Bonds, held by Irving as Trustee under a Trust Indenture dated September 26, 1960 from the Company to said Trustee (said advance by Maritime in the amount of \$276,000, together with interest at the rate of six per centum per annum and a charge of three-fourths per centum per annum both computed and payable on the unpaid balance of the principal of the advance, being herein called the "Maritime Advance").
2. The Company has requested an advance of \$325,000 by Irving, being made this date, to be used to pay interest

Excerpts from Contract No. MA-3928

due on the Bonds on July 1, 1965, and for other purposes (said advance by Irving in the amount of \$325,000, together with interest at the rate of 6 per centum per annum computed and payable on the unpaid balance of the principal of the advance, being herein called the "Irving Advance").

3. The Company has assigned to Irving by instrument of assignment dated June 30, 1964 all monies and claims for moneys due and to become due to the Company and all claims for damages arising out of the breach of that certain Tanker Consecutive Voyage Charter Party, Contract MST-TV-686(X), with the Department of Navy, Military Sea Transportation Service, for SS ATLAS dated November 4, 1963, as the same may be amended or supplemented from time to time (said Charter as the same may be amended or supplemented from time to time, being herein called the "Charter") and all monies and claims for monies due and to become due to the Company and all claims for damages in respect of the actual or constructive total loss of or requisition of the vessel performing said charter (said assignment, as reaffirmed by instruments of assignment dated December 28, 1964 and December 31, 1964 and July 26, 1965, and as the same may be amended or supplemented from time to time, being herein called the "Assignment").
4. The parties hereto desire to execute this Agreement to state their respective interests in the Assignment as security for the Irving Advance and as security for the Maritime Advance and the procedure for application of moneys received under the Assignment.

Excerpts from Contract No. MA-3928

Now, THEREFORE, THIS AGREEMENT

WITNESSETH:

That, in consideration of Maritime making the Maritime Advance and Irving making the Irving Advance, the covenants herein contained and for other good and valuable consideration the receipt whereof is hereby acknowledged and in order to further secure the repayment to Irving of the Irving Advance and to Maritime of the Maritime Advance, the parties hereto for themselves, their successors and assigns hereby covenant and agree as follows:

1. That the Assignment and all monies received thereunder or in respect thereof and held by Irving until applied as herein provided shall be and remain as security, (a) for the Irving Advance until the Irving Advance has been paid in full and (b) for the Maritime Advance, subject to the prior payment in full of the Irving Advance, until the Maritime Advance has been paid in full.

• • • • •

3. That after the Irving Advance has been paid in full (i) Irving shall immediately upon receipt by it of each payment of charter hire or other monies under the Assignment advise Maritime in writing of the date and type of payment, amount, and such other information as Maritime may reasonably request with respect thereto; (ii) Irving shall retain and hold each such payment of charter hire or other monies until Maritime shall have determined the amount (if any) to be paid to the Company (or its agent) for the continued current operation of the Vessel; and (iii) Irving shall disburse such payment of charter hire or other mon-

Excerpts from Contract No. MA-3928

ies to Maritime and/or the Company (or its agent) and in such amount as Maritime shall direct. . . .

4. The Company hereby authorizes, directs and empowers, Irving and Maritime respectively to apply any and all charter hire and other monies received under the Assignment to payment or prepayment of the Irving Advance and to payment or prepayment of the Maritime Advance respectively.

* * * * *

IN WITNESS WHEREOF, This Agreement has been executed and delivered as of the day and year first above written.

ATTEST: IRVING TRUST COMPANY

(Signature Illegible) s/ JOHN K. WETZEL
Title Asst. Secretary Title Asst. Secretary

ATTEST: TANKERS & TRAMPS CORP.

s/ JOHN HATGIS s/ RAYMOND J. SCULLY
Title Secretary Title President

ATTEST: United States of America

s/ JOHN C. O'CONNELL Secretary of Commerce
Assistant Secretary By Maritime Administrator
By s/ JAMES S. DAWSON, JR.
Secretary
Maritime Administration

**Letter from A. L. Burbank & Co., Ltd. to Irving Trust
Company Dated December 3, 1965 with Statement
of Outstanding Invoices as of 12/2/65 Attached**

[Letterhead of A. L. BURBANK & COMPANY, Ltd.]

December 3, 1965

Irving Trust Company
One Wall Street
New York, New York

Attention: Mr. John K. Wetzel,
Assistant Secretary

Re: Contract No. MA3928 dated July 26, 1965

Gentlemen:

Reference is made to subject agreement and we request that you release to the A. L. Burbank & Company, Ltd.—Special Account—Tankers & Tramps Corp. the balance of funds on voyage No. 75 in the amount of \$40,948.65 to be applied against attached statement.

Kindly advise when same has been accomplished.

Very truly yours,

**A. L. BURBANK & COMPANY, LTD.
AGENTS FOR OWNERS OF S/T "ATLAS"**

By /s/ W. J. McCUTCHAN
W. J. McCUTCHAN
Auditor

WJM/dfs

Statement of Outstanding Invoices

TANKERS & TRAMPS CORP.
OUTSTANDING INVOICES
AS OF 12/2/65

| | | |
|------------------------------|-------------------------------|--------------|
| Marubeni—Iida | Bunkers | \$ 28,876.76 |
| Refineria Panama, SA | " | 17,221.90 |
| Esso International, Inc. | " | 22,006.00 |
| Gulf Oil Trading | Lubes | 1,901.79 |
| John F. Curry Agency | Insurance | 7,925.18 |
| Frank B. Hall & Co., Inc. | " | 1,000.80 |
| Unions | Contributions | 8,368.50 |
| American Maritime Assoc. | " | 990.00 |
| Panama Canal Co. | Tug Expense | 1,242.65 |
| General Steamship Co. | Port Disbursement & Stores | 3,228.39 |
| Gray Mackenzie & Co. | Port Disbursement & Stores | 2,338.24 |
| Yusuf Bin Ahmed Kanoo | Port Disbursement & Stores | 8,234.40 |
| C. F. Sharp & Co. | Port Disbursement & Stores | 1,414.20 |
| Geo. N. Haziris M.D. | Medical Expense | 13.00 |

*Statement of Outstanding Invoices***United Travelers**

| | | |
|------------------------------|---------------|----------------------------|
| Service, Inc. | Travel | 265.00 |
| A. L. Burbank & Co., Ltd. | Various | 818.29 |
| John McGuirk Co. | Stationery | 11.55 |
| The Federal Paint Co. | Paints | 3,636.18 |
| Drew Chemical Corp. | Supplies | 416.11 |
| I. T. T. Communications | Cable Expense | 193.28 |
| Internal Revenue | Taxes | 39,272.22 |
| F. V. Hannum & Co., Inc. | Commissions | 34,009.02 |
| C. T. Associates, Inc. | Back Calls | <u>15,187.20</u> |
| | | <u><u>\$203,017.24</u></u> |

**Letter of U.S.A. to Irving Trust Company
Dated December 14, 1965**

Irving Trust Company
One Wall Street
New York, New York 10015

Attention: John K. Wetzel, Assistant Secretary

Gentlemen:

Reference is made to your letter dated December 3, 1965, enclosing letter of A. L. Burbank & Company, Ltd., in which they request that you release the sum of \$40,948.65 to the A. L. Burbank & Company, Ltd.—Special Account—Tankers & Tramps Corp. to be applied against the list of outstanding invoices as of December 2, 1965, submitted by them. You also advise that there is a balance in the Cash Collateral Account of \$42,611.87 as of December 3, 1965.

Pursuant to the terms of the Agreement dated July 26, 1965, between Tankers & Tramps Corp., the United States of America, and Irving Trust Company (Contract No. MA-3928, you are hereby directed to release the sum of \$40,948.65 from the aforesaid Cash Collateral Account to the A. L. Burbank & Company, Ltd., Special Account for Tankers & Tramps Corp.

Sincerely yours,

By /s/ **EDWARD APTEKER**
Edward Apteker
Chief, Office of Government

cc:

A. L. Burbank & Company, Ltd.

27a

**Credit Advices for Cash Collateral Account Dated
December 20, 1965 and December 29, 1965**

**IRVING TRUST COMPANY
NEW YORK**

DATE Dec. 20, 1965

| | AMOUNT |
|--|------------|
| We credit your cash collateral account with check of Navy Dept.—U.S.A. in settlement of invoice of 12/9/65 132 A S.T. Atlas MSTS. | 174,153.12 |

To A. L. BURBANK & CO., LTD.
 SPECIAL ACCOUNT
 TANKERS & TRAMPS CORP.
 120 WALL STREET
 NEW YORK, NEW YORK 10005 A/C No.

**IRVING TRUST COMPANY
NEW YORK**

DATE Dec. 29, 1965

| | AMOUNT |
|--|-------------|
| We credit your cash collateral account with check of Navy Dept.—U.S.A. in settlement of invoice 132-B S.T. Atlas MSTS. | \$37,658.83 |

To A. L. Burbank & Co. Ltd.
 Special Account
 Tankers & Tramps Corp.
 120 Wall Street
 New York, N. Y. 10005 A/C No.

Debit Advices for Cash Collateral Account
Dated January 6, 1966

IRVING TRUST COMPANY
NEW YORK

DATE Jan. 6, 1966

WE DEBIT YOUR CASH COLLATERAL
ACCOUNT FOR TRANSFER OF FUNDS
TO THE MARITIME ADMINISTRA-
TION TO BE APPLIED AGAINST
PRINCIPAL AND INTEREST UNDER
YOUR NOTE DATED 7/26/65 AS PER
THEIR WIRE 1/5/66. AMOUNT

To A. L. BURBANK & CO., LTD.
SPECIAL ACCOUNT
TANKERS & TRAMPS CORP.
120 WALL ST.
NEW YORK, N. Y. 10005 A/C No.

**Excerpts from Consent (Trial Stipulation)
Pre-Trial Order Dated September 6, 1973**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION, successor by merger to
ESSO INTERNATIONAL INC.,

Plaintiff,

—against—

A. L. BURBANK & COMPANY, LTD. and
UNITED STATES OF AMERICA,

Defendants.

For the purpose of trial of the above entitled matter, it is hereby stipulated and agreed by and between the parties hereto that:

1. At all times relevant herein plaintiff Esso International Inc. (now known as Exxon International Company, a division of Exxon Corporation, its successor by merger) was a Delaware corporation with its principal place of business at 15 West 51st Street (presently located at 1251 Avenue of the Americas), New York, New York.
2. At all times relevant herein defendant A. L. Burbank & Company, Ltd. (hereinafter called "Defendant Burbank") was a New York corporation with its principal place of business at 120 Wall Street, New York, N.Y. and was and

Excerpts from Consent Pre-Trial Order

still is engaged in the business of acting as agent, broker, or operator of vessels for various vessel owners.

3. At all times defendant United States of America (hereinafter called "Defendant USA") was a sovereign and the Maritime Administration (hereinafter called "Marad") and the Military Sea Transportation Service (hereinafter called "MSTS" and now known as Military Sealift Command), a part of the Department of the Navy, were agencies of Defendant USA.

4. Tankers & Tramps Corp. (herein "Owner") was the registered Owner of the S.T. ATLAS (herein the "Vessel") from August 27, 1958 until the judicial sale of the Vessel on March 10, 1966, in furtherance of a foreclosure libel filed by the Government in January, 1966. The sale was confirmed on March 21, 1966.

5. On or about March 5, 1965, plaintiff and Defendant Burbank entered into a certain marine fuel oils contract dated as of March 5, 1965 whereunder plaintiff agreed to sell and Defendant Burbank agreed to purchase marine fuel oils during the calendar year of 1965 (hereinafter called the "Bunker Contract").

6. On or about October 1, 1965, Defendant Burbank ordered from plaintiff bunker "C" fuel oil estimated in the total amount of 10,500 barrels to be delivered to the Vessel at the port of Amuay Bay, Venezuela on or about October 4, 1965.

7. On October 6, 1965, plaintiff, pursuant to such order from Defendant Burbank, arranged with and caused its

Excerpts from Consent Pre-Trial Order

local supplier Creole Petroleum Corporation to deliver to the Vessel at the port of Amuay Bay, Venezuela 11,003 barrels of bunker "C" fuel oil.

8. By reason of said delivery, there is due and owing to plaintiff the sum of \$22,006.00, no part of which has been paid.

9. On August 27, 1958, in order to secure payment of a promissory note in the principal sum of \$9,593,900.00, plus interest, dated August 27, 1958, the Owner executed and delivered to The Bowery Savings Bank a First Preferred Mortgage covering the Vessel with a maturity date of August 26, 1978.

10. On August 27, 1958, The Bowery Savings Bank and the Government, represented by the Secretary of Commerce acting by and through the Maritime Administrator, entered into a Contract of Insurance of Mortgage No. MA-1795 pursuant to Title XI of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1271, *et seq.*) whereby the Secretary of Commerce insured the payment of the unpaid balance of the principal of the aforesaid First Preferred Mortgage and of the aforesaid promissory note dated August 27, 1958, and the interest thereon.

11. On September 26, 1960, by an amendment or supplement to the aforesaid First Preferred Mortgage and by an Assignment of First Preferred Mortgage, the Mortgage, together with all rights thereunder, was assigned by The Bowery Savings Bank to Irving Trust Company, as Trustee-Mortgagee under a certain Trust Indenture. Simultaneously with these transactions, the Owner issued and

Excerpts from Consent Pre-Trial Order

delivered to the Trustee-Mortgagee Irving Trust Company "United States Government Insured Merchant Marine Bonds, 5% S.T. ATLAS" in the principal amount of \$8,838,000.00 (herein called the "Bonds"), and the aforesaid promissory note dated August 27, 1958 was cancelled.

12. On September 26, 1960, the aforesaid Contract of Insurance of Mortgage was amended to provide, among other things, that the insurance thereunder would run to the Trustee-Mortgagee Irving Trust Company.

13. On August 9, 1963, Owner executed and delivered to the Government, represented by the Secretary of Commerce acting by and through the Maritime Administrator, a promissory note dated August 9, 1963, in the principal sum of \$266,000.00, plus interest. Owner executed and delivered said promissory note in consideration of a loan to it by the Government, represented by the Secretary of Commerce acting by and through the Maritime Administrator, in the sum of \$266,000.00, constituting the amount of a mandatory redemption of its Bonds required to be made on July 1, 1963.

14. On July 29, 1964, in order to secure payment of the aforesaid promissory note, dated August 9, 1963, Owner executed and delivered to the Government, represented by the Secretary of Commerce acting by and through the Maritime Administrator, a Second Preferred Mortgage on the Vessel.

15. On November 4, 1963, a written charter agreement Contract No. MST-TV-686 (X), dated November 4, 1963,

Excerpts from Consent Pre-Trial Order

was entered into between Owner and the Government, represented by MSTS, Department of the Navy. The term of said charter was for five (5) years from the date the Vessel was tendered with options on the part of MSTS to extend the term subject to certain terms and conditions. The said charter had not been terminated during the period from the Vessel's delivery in 1963 or 1964 until January, 1966. From about June 1960 until January 1966 the Vessel had been chartered to MSTS.

16. On July 1, 1964, an Agency Agreement was entered into with respect to the Vessel.

17. On or about July 26, 1965, Defendant USA advanced to Owner the principal, amounting to \$276,000.00, and Irving Trust Company advanced to Owner the interest, amounting to \$325,000.00, of a payment due on the Bonds and aforesaid First Preferred Mortgage for which Owner had defaulted. In connection with these advances, on July 26, 1965, in addition to promissory notes and other things, Contract No. MA-3927 was executed by Owner and Marad and Contract No. MA-3928 was executed by Owner, Marad and Irving Trust Company.

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Excerpts from Consent Pre-Trial Order

Dated: New York, New York
September 6, 1973

KIRLIN, CAMPBELL & KEATING

By: /s/ **PAUL F. McGuire**

PAUL J. CURRAN
United States Attorney
Gilbert S. Fleischer
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
Attorneys for Defendant
United States of America

By: /s/ **WARREN A. SCHNEIDER**

BURKE & PARSONS
Attorneys for Defendant
A. L. Burbank & Company, Ltd.

By: /s/ **ALFRED A. MEYER**

SO ORDERED:

/s/ **ROBERT L. CARTER**
U. S. District Judge

**Trial Testimony of Paul Caramella
on Direct Examination**

[49]

PAUL CARAMELLA, called as a witness on behalf of the Defendant Burbank, after being duly sworn, testified as follows:

Q. By whom were you employed in October 1965? A. A. L. Burbank and Company, Limited.

Q. In what capacity were you so employed? A. Vice President and Treasurer.

Q. Are you still employed by A. L. Burbank? A. Yes, sir.

Q. Are you still the Vice President and Treasurer? A. Yes, sir.

• • • • •

Q. What is the business of A. L. Burbank and Company? A. Steamship agents and brokers.

Q. Did A. L. Burbank ever act as operating agent for [50] the vessel ATLAS? A. Yes, sir.

Q. Are you personally familiar with the facts surrounding the operation of that vessel insofar as Burbank is concerned? A. Yes, sir.

Q. Would you tell us the dates during which Burbank acted as operating agent for the vessel? A. April 1, 1963, till January 11, 1966.

Q. And would you tell us by whom the ATLAS was owned? A. Tankers and Tramps Corporation.

• • • • •

[55] Q. Mr. Caramella, these earnings of the vessel, they came from the charter party that is already in evidence here as defendant Burbank's Exhibit A, is that correct?

Paul Caramella—Direct

A. That charter party commenced in 1964, yes. Prior to that, the freight—the freight earnings, that's correct.

Q. Did A. L. Burbank negotiate the fixture of the vessel under the charter party? A. If my memory serves me correctly, yes. Then we used a tanker chartering broker to handle negotiations, Ted Hannum. They are a tanker chartering house.

Q. Are you familiar with the charter party and its terms? A. Yes.

Q. You are familiar with Clauses 7A, a and e of the charter party, the so-called bunker escalation clause? A. May I see it, please?

Mr. Meyer: It is marked as an exhibit here. On page 16. Here it is, your Honor.

Q. Was your answer yes, you are familiar with it? A. Yes.

Q. What do you understand that provision to mean, that's a and e, the bunker escalation clause, what do you understand that to mean? A. Well, any increase in the prices in the first [56] year of operation under the charter, the owner has just got to suffer the consequences, or gain if the prices go down. After the first year, the owner, say, for example if the prices climb drastically over the rates submitted, they could apply to the charterer or the Government's MSTS for an increase to cover the increased costs.

By the same token, if the price of fuel comes down, the Government would be entitled to a credit on the fuel.

Does that answer the question?

Q. Yes, that's all right. Yes, it does.

Paul Caramella—Direct

Did the special account with Irving also receive the freight monies earned under the charter? A. Well, yes. From inception until 1965, I believe in August of 1965, when a new account was established, I think by the Government and the owner, maybe with Irving Trust, called the cash collateral account. This here was established I think because of certain additional loans or advances made to the company. So from that point forward the freight monies, we would continue to bill MSTS for the freight.

The freight, when it arrived at New York, and Irving Trust Company, they would credit this cash collateral account.

[57] Q. Instead of the special account? A. Instead of the special account, that's correct. And then we, as operating agents, to receive funds for the operation expenses of the vessel, we had to make an application to Irving Trust Company, requesting the release of funds to meet—from the collateral account to the special account, to meet the operating expenses of the vessel.

Q. Excuse me, your applications would be the Irving Trust Company only? A. Well, we usually send a copy to the Maritime Administration. We would write in letter form to Irving Trust Company with a copy to Marad by mail. We would list the accounts payable, known accounts payable at that time. This operation was worked on a cash basis.

Q. Whose approval and authorization would you be seeking when you sent these statements in? A. I think final approval, I believe there was a communication sent from the Government, Maritime, to Irving Trust Company,

Paul Caramella—Direct

authorizing them to release these funds from the cash collateral account to the special account.

Q. Did Burbank have any authority to withdraw monies from this cash collateral account? A. No, sir.

Q. Do you know the contract pursuant to which this [58] cash collateral account was established, are you familiar with it? A. I recall seeing it at one time, but I can't say I'm too familiar from memory. I was probably furnished a copy of it at that time.

Q. I show you contract number MA-3928, dated July 26, 1965. It's in as defendant Burbank's Exhibit F, I think.

I ask you, is that the contract pursuant to which the cash collateral account was established? A. Yes, sir.

* * * * *

[59] Q. Was the loan by Irving Trust Company ever repaid to Irving Trust Company? A. I believe so, yes. Sometime in October of '65.

* * * * *

[60] Q. Mr. Caramella, during the period of Burbank's agency for the vessel, that is from April '63 to January '66, did you, acting on behalf of Burbank, ever meet and confer with representatives of the Government with respect to this vessel? A. Yes, sir.

Q. About how often did you meet? A. I would say over the period, in Washington, or speaking on the telephone, I would say, an average of once a month, and it would be on this vessel and also discussions on another vessel we operated under the same basis, the vessel *ACHILLES*.

Q. What did you talk about when you met with these people? A. Well, we reviewed and kept them advised of any developments that we heard, the operation of the vessel, the problems with the vessel.

Paul Caramella—Direct

For example, I can recall one time the vessel ATLAS had a fire in Japan, in a shipyard. We reported that. We made cash projections on the cash flow, how we [61] could meet the obligations in reducing the principal and interest. Sometimes they weren't too—from hindsight, not too good. But we made forecasts of what the results would be so that the vessel could continue in operation.

Q. Can you name anyone from the Maritime Administration who you met with, what individuals, do you recall?
A. The majority of the discussions was with Mr. Murray Schwartz and then with Mr. Hyde. Occasionally with Mr. Yowell. But the primary discussions were on this vessel with Mr. Schwartz of Maritime. On occasion he would call me, say if I forwarded a cash projection, he'd say where I goofed or ask explanation of certain items I made in the projections, but it was mainly with Mr. Schwartz during this period.

Q. Mr. Caramella, did any representative of Tankers and Tramps Company, the owner, accompany you on your trips to Washington in this connection in respect to the vessel ATLAS? A. Not that I can recall.

• • • • •

[62] Q. Did A. L. Burbank ever receive Esso's invoice for bunker fuel oil furnished to the vessel on October 6, '65?
A. Yes, sir.

• • • • •

Q. When was Esso's invoice received by Burbank? A. It would be the date stamped on the invoice there.

November 9, 1965.

• • • • •

Paul Caramella—Direct

[66] **Mr. Meyer:** I would like to now introduce into evidence, the letter of A. L. Burbank, dated December 3, 1965, with a statement of outstanding invoices dated 12/2/65, all of this in accordance with stipulation paragraph 18B, (p).

(Defendant Burbank Exhibit L is received in evidence.)

Q. Mr. Caramella, was that letter—I notice it was signed by a Mr. McKuchin.

Was it signed by you and sent pursuant to your authority as treasurer of Burbank? A. Sent pursuant to my authority, yes.

Q. Did you prepare the annexed statement of invoice dated 12/2/65? A. It could have been prepared by myself or Mr. McKuchin. I don't recall.

Q. I notice that the letter only seeks withdrawal from the collateral account of \$40,948.65, and yet the accompanying statement lists expenses of \$203,017.24.

Would you explain the discrepancy? A. That was the balance of funds in the account, so it is senseless to ask for something that's not there.

Q. You were so advised by whom that that was all that was in the account? A. I felt common sense, if you only have 40,000, [67] why ask for more.

Q. Who advised you there was only 40,000 in the account? A. We received from Irving Trust copies of their credit advice, what they credit to the collateral account.

Q. Mr. Caramella, I notice that on the statement dated 12/2/65, there is a—third from the top, entitled Esso Inter-

Paul Caramella—Direct

national Inc. Is that the bunker invoice that is in evidence now? A. Yes, sir.

Q. Did the Government approve payment of the expenses up to the amount of that \$40,000 figure, Mr. Caramella? A. I have to assume so, if we received it.

Mr. Meyer: I would like to put into evidence Government's letter dated December 14, '65.

(Defendant Burbank's Exhibit M is received in evidence.)

Mr. Meyer: That's 18Q of the trial stipulation.

Q. Mr. Caramella, were there any additional monies received into the cash collateral account after December 3rd, 1965? A. Yes, sir.

Q. Would you tell us the amounts and the dates of these funds? [68] A. On December 20, \$174,153.12 was received. On December 29, \$37,658.83 was received into the collateral account from MSTS.

Mr. Meyer: I would now like to introduce in evidence in accordance with paragraph 18R, the credit advices of Irving Trust Company with respect to the funds just testified.

(Defendant Burbank's Exhibit N is received in evidence.)

Q. Mr. Caramella, was the money received into the cash collateral account, as you just testified, was that—were those funds earnings from the vessel's freight? A. Yes, sir.

Paul Caramella—Direct

Q. Were those funds ever used to pay the expenses, including Esso bill, indicated on the Burbank statement dated 12/2/65? A. No, sir.

Q. Would you explain why not, if you know? A. Well, on January 5, the Government, Maritime, ordered Irving Trust Company to transfer 210,000 from this collateral account to the Maritime Administration and Irving Trust Company transferred the funds out of the collateral account and left a small balance of approximately \$1800 in the collateral account.

[69] Mr. Meyer: I want to introduce into evidence now, in accordance with trial stipulation 18R, the debit advices.

(Defendant Burbank's Exhibit O is received in evidence.)

The Court: Wait now. It is 18R, I believe. I thought you had done that.

Mr. Meyer: I am doing the debit advice where they withdrew the 210,000 from the account. It is all under paragraph 18 R on page 6 of the trial stipulation.

Q. Mr. Caramella, just to clarify one thing. I notice here the language on this debit advice is "We debit your cash collateral account," et cetera, and it is to A. L. Burbank and Company special account, just to be certain of this, did Burbank have any control over the funds in the cash collateral account? A. No, sir.

The Court: We have already established that.

Paul Caramella—Direct

Q. Mr. Caramella, was A. L. Burbank ever asked or consulted with regard to the withdrawal of these funds prior to the withdrawal? A. Not as I can recall.

Q. Has Burbank ever received any money to pay the expenses listed on the statement of December 2, 1965? [70] A. No, sir.

* * * * *

**Trial Testimony of Paul Caramella
on Cross-Examination**

[71] Q. Did you receive the bill from Esso? A. Yes, sir.

Q. And you did not pay the bill? A. No.

Q. Did you have any contact with Esso subsequent to [72] the receipt of the bill? A. Oh, much later, yes. I received calls from Esso looking for payment.

Q. And what did you tell Esso? A. We were agents for the vessel. We didn't have any money to pay for it. The Government took the balance of freight on hand and we didn't have any funds to pay or the special account didn't have any money to pay for the bunkers.

* * * * *

**Trial Testimony of Roy H. Yowell
on Direct Examination**

[74] • • • •

Roy H. YOWELL, called as a witness on behalf of the Government, having been first duly sworn by the Clerk of the Court, testified as follows:

[75] Q. And whom are you presently employed by? A. I'm with the Maritime Administration.

Q. What is your position? A. Chief of the Office of Subsidiary Administration.

Q. And how long have you been in that position? A. I have had that position for a year and half. I have been with the Maritime—connected with this particular program for fifteen years.

Q. What was your title prior to the present position? A. Chief of the Division of the Mortgage Insurance Contracts, which administered the program of the case which we are discussing.

• • • •

[76] In this particular case, when the Kulukundis empire collapsed, over a million dollars had been withdrawn from three Title XI companies that we administered for on the Kulukundis activities, one of which was building a skyscraper on Madison Avenue in New York.

As a result of that illegal or contrary to the Documents Act, Maritime felt in the best interest of the Government, to closely police the operations of this ship to make sure that no further funds were diverted to non-operating use.

It was at that time that Burbank was appointed agent for this ship and they administered funds. They could

Roy H. Youell—Direct

spend any money they wanted to for the operation of the ship without Maritime's approval or without anyone else's approval up until July 1965. At that time the company could not make principal or interest payments on the mortgage and Maritime loaned them \$276,000 to make the principal payment and Irving loaned them \$325,000 to make the interest payment.

At that time the arrangements were made for this cash collateral account whereby Irving received the proceeds from the MSTS charter, took \$1,000 a month out until their \$325,000 was paid; paid over to Burbank sufficient money to keep the ship operating, and after that Maritime [77] was to be paid off. It was not until—we received periodic forecasts from Burbank and it was not until December of 1965 that we realized how bad off this company actually was.

We had been under the assumption from the cash flows that we had received that bills were being met and that there was a chance that this company could survive after all.

In December 1965 it was apparent that this ship could not make it.

It had large repair bills and Burbank submitted bills which were considerably in excess of what we thought they were at that time.

The Court: Is this bunker fuel oil item, that's oil that was ordered and bought necessary for the operation of that ship?

The Witness: Yes, it is the fuel that runs the ship. Without that the ship could not move. That was an

Roy H. Yowell—Direct

operating cost. That was not an administrative or agency fee or anything else. That was just as much an operating cost of the ship as crews wages.

[78]

* * * * *

The Court: Let me get to some point. When this cash account—is that called the cash collateral account?

The Witness: Yes.

The Court: When that was established and Irving Trust Company, after taking out the funds to cover the interest that it had advanced on the mortgage, these funds that are in Exhibit N, credit and debits, these are defendant Burbank's Exhibit in which shows credit advice to Burbank from Irving Trust Company crediting your cash collateral account with a check of the Navy Department of \$174,153.12.

Then another check for \$37,658.83. Then there is a debit on January 6 of \$210,000. Now, am I to understand that what really happened here—let me see if I can get all these exhibits together and know where I am.

[79] That there was as of January 6, in the cash collateral account, \$210,000 and for the operation of the vessel, operating costs, there had been some outstanding invoices including this amount that is in dispute here was on an invoice dated 12/2/65.

Now, am I to understand that what really happened is that the Government had taken the position that the ship was not going to be able to make it and therefore took this \$210,000, or took whatever money

Roy H. Yowell—Direct

it could, to get back on its mortgage, is this what the situation was?

The Witness: Your Honor, let me explain it in a little more detail. The arrangement in July when Irving and Maritime loaned this money was, Irving was to get theirs back first.

The Court: All right, they got theirs.

The Witness: Then Maritime was to get theirs back next. We did get ours back in January, January 6, 1966.

* * * * *

The Court: And you took the money, and I gather [80] now that the position of the Government is that it had a prior lien without regard to whether these expenses were operating expenses or not?

The Witness: The only expenses that came ahead of the mortgage were crews wages and salaries.

* * * * *

Q. When did Burbank start requesting approval from Maritime for pay for the expenses? A. After Irving was paid off the disbursement invoices were sent to Maritime. There were three of them, all of which we approved and sent back to Burbank.

Q. You approved the payment of the December 3, 1965 invoice which included this bill? A. I don't specifically recall the December one, but if we received it we approved it, because we had rubber stamped them all. We couldn't question the operating procedures. We had confidence that Burbank was doing the best they could.

Roy H. Yowell—Direct

The Court: I gather, Mr. Yowell, that your position is, was then and is now, that the Government by being involved, one, in approving the appointment of Burbank and in approving the payment of the various costs, that all the Government really was doing was trying to protect its investment it had in terms of the second mortgage [81] and the first mortgage and that it was not in that point in fact, exercising any proprietary control, ownership in respect to the vessel; all it was doing was doing what a prudent investor would do to do the best it could to be sure that the operation went along fairly well, so the investment would be protected, I gather that is the position of the Maritime Administration during that particular time, is that right?

The Witness: That is exactly correct.

The Court: All right.

Q. Did you receive any requests for approval of payment after December 2? A. I don't specifically recall the requests. There were three totally. I don't know when we received them.

Q. And did the Government finally arrest the vessel?

A. Yes.

Q. Can you tell us when that was? A. It was in January, early January 1966.

* * * * *

Memorandum Opinion of Honorable Robert L. Carter
Dated February 20, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Esso INTERNATIONAL INC.,

Plaintiff,

—against—

A. L. BURBANK & COMPANY, LTD. and
UNITED STATES OF AMERICA,

Defendants.

This case was tried on stipulated facts and testimony of a few witnesses at trial. The facts as found by the court follow: Plaintiff, Esso International Inc., now known as Exxon International Company, is a division of Exxon Corporation. The defendant A. L. Burbank & Company, Ltd. was and is in the business of acting as agent, broker or operator of various vessels, and it acted in such capacity at the time this controversy arose in respect of the S.T. Atlas. Tankers & Tramps Corp. was the registered owner of the S.T. Atlas from August 27, 1958 until the judicial sale of the vessel on March 10, 1966, in furtherance of a foreclosure libel filed by the government in January, 1966. The sale was confirmed on March 21, 1966. The United States is also a defendant; its Maritime Administration (Marad) and the Military Sea Transportation Service, now known as the Military Sealift Command (MSTS) are a part of the Navy and agencies of the United States.

Memorandum Opinion of Hon. Robert L. Carter

On or about March 5, 1965 plaintiff and defendant Burbank entered into a marine fuel oil contract dated March 5, 1965 pursuant to which plaintiff agreed to sell and Burbank agreed to buy marine fuel oil during the calendar year 1965. Pursuant to this contract, Burbank ordered 10,500 barrels of bunker "C" fuel oil to be delivered to the S.T. Atlas at Port Amuay, Venezuela on or about October 4, 1965. In compliance with the order plaintiff had 11,003 barrels of bunker "C" oil delivered to the vessel at Port Amuay by its local supplier, Creole Petroleum Co. The sum of \$22,006.00 due to plaintiff for this delivery has never been paid.

The vessel was covered by a first preferred mortgage held by the Bowery Savings Bank pursuant to payment of a promissory note of \$9,500,000 dated August 27, 1958 with a maturity date of August 26, 1978. On August 27, 1978, pursuant to Title XI of the Merchant Marine Act of 1936, as amended (46 U.S.C. §1271 *et seq.*), the Secretary of Commerce, through Marad, entered into a contract of insurance of the mortgage with Bowery Savings in respect of the unpaid balance of principal of the first preferred mortgage, the promissory note and interest.

On September 26, 1960 the mortgage held by Bowery was assigned or transferred to the Irving Trust Co., and simultaneously with this transfer or assignment, Tankers & Tramps Co. issued and delivered to Irving Trust Co. "United States Government Insured Merchant Marine Bonds, 5% S.T. Atlas" in the principal amount of \$8,838,000 and the original promissory note was cancelled. On September 26, 1960 the contract of insurance of mortgage was amended to run to Irving Trust.

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On August 9, 1963, Tankers & Tramps delivered to the government, through the Secretary of Commerce, acting by and through Marad, a promissory note in the principal sum of \$266,000, plus interest. This note was in consideration of a loan by government in the sum of \$266,000 constituting the amount of a mandatory redemption of its Bonds required to be made on July 1, 1963. On July 29, 1964, to secure payment of the August 9, 1963 promissory note, Tankers & Tramps executed and delivered to Marad a second preferred mortgage on the S.T. Atlas.

On November 4, 1963 a written charter agreement was entered into between Tankers & Tramps and MSTS, signed by defendant Burbank as agent for Tankers & Tramps. The term of the charter was for 5 years from the date the vessel was tendered with MSTS having the option to alter the terms of the charter under certain conditions. The vessel was delivered in 1964. The charter had not been terminated and was in full force and effect at the time of the transaction which is the subject of this litigation. Under the terms of the charter the anticipated rate for the bunker fuel was included in freight rate to be paid by MSTS and if the cost of bunker fuel rose, a corresponding rise in freight rate was provided for.

On July 1, 1964 an agency agreement was entered into between Tankers & Tramps and Burbank in respect to the operation of the vessel. On or about July 26, 1965 the government advanced to Tankers & Tramps \$276,000 and Irving Trust advanced to Tankers & Tramps the interest, amounting to \$325,000 of a payment due on the Bond and on the first preferred mortgage in which payment was in default. The owner and government entered into contract #MA-

Memorandum Opinion of Hon. Robert L. Carter

3927 and the owner, the government and Irving Trust entered into contract #MA-3928. Pursuant to these contracts the owner agreed to apply all monies it received, except those for operating expense, to pay its indebtedness to Irving and the government. By October, 1965 Irving was paid.

The agency agreement dated July 1, 1964 in effect on October 6, 1965 provided that Burbank was to "cause to be furnished to the Vessel, provisions, fuel . . ." While the government did have the right to approve the agent, this did not transfer to it ownership or control of the vessel. This arrangement was merely intended to protect the government's interest as mortgagee.

This case is fully covered and governed by *Fitzgerald v. A. L. Burbank*, 451 F.2d 670 (2d Cir. 1971). There, the court discusses the same charter agreement and mortgage involved here. The government was held there clearly not to have been acting as owner but only exercising rights as mortgagee. Thus, the defendant A. L. Burbank, as agent for the owner Tankers & Tramps, must be liable for payment to the plaintiff of the bunker fuel oil, plus 6%, from the date of the filing of this lawsuit.

SO ORDERED.

Dated: New York, New York
February 20, 1974.

ROBERT L. CARTER
U.S.D.J.

Final Judgment Entered March 14, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION, successor by merger to
Esso INTERNATIONAL, INC.,

Plaintiff,

—against—

A. L. BURBANK & COMPANY, LTD. and
UNITED STATES OF AMERICA,

Defendants.

This cause having come on for trial before Honorable Robert L. Carter, without a jury, and the Court having filed its memorandum opinion dated February 20, 1974, reciting its findings of fact and holding that the defendant A. L. Burbank & Company, Ltd., is liable for payment to the plaintiff of \$22,006.00, plus 6% interest from the date of the filing of this action, and that the defendant United States of America is not liable therefor, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff, Exxon Corporation (successor by merger to Esso International, Inc.) recover of and from defendant, A. L. Burbank & Company, Ltd., the sum of \$22,006.00 with interest thereon from April 10, 1967, in the amount of \$9,105.00 making a total recovery of \$31,111.00, with costs to be taxed, and that the plaintiff have execution therefor, and it is further

Final Judgment Entered March 14, 1974

ORDERED, ADJUDGED AND DECREED that this action be and is hereby dismissed as against defendant United States of America and that the cross claim of defendant, A. L. Burbank & Company, Ltd., against defendant, United States of America be and is hereby dismissed with costs to be taxed.

Dated: New York, New York
March 12, 1974

ROBERT L. CARTER
U.S.D.J.

Judgment entered this 14th day of March, 1974

RAYMOND F. BURGHARDT
Clerk



COPY RECEIVED

JUL 22 1974

KIRLIN, CAMPBELL & KEATING